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# THE FORT McDOWELL INDIAN COMMUNITY WATER RIGHTS SETTLEMENT ACT OF 1990

SEPTEMBER 28 (legislative day, SEPTEMBER 10), 1990.—Ordered to be printed

Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

## REPORT

[To accompany S. 2900]

The Select Committee on Indian Affairs, to which was referred the bill (S. 2900) to provide for the settlement of the water rights claims of the Fort McDowell Indian Community, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

### PURPOSE

The purpose of S. 2900 is to provide for the settlement of the water rights claims of the Fort McDowell Indian Community in Arizona.

### BACKGROUND

The members of the Fort McDowell Indian Community are Yavapai Indians whose aboriginal territory covered most of central Arizona, including the present-day Fort McDowell Reservation.

Following the Civil War, increasing numbers of non-Indians moving into Arizona created pressure to place the Yavapai on a reservation. In 1873, the Department of the Army moved the Yavapai to a military post near Camp Verde, where they were encouraged to farm. The Indians began by digging a five-mile long irrigation ditch. The post doctor later wrote of their effort: "the digging of that ditch by hand with every conceivable sort of implement, from rusty and broken shovels to spoons is worthy of a place in the greatest annals of the West." The post commander wrote that he



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believed that the reservation would be self-supporting within a few years.

In 1875, however, the Department of the Army marched the Yavapai from Camp Verde to the San Carlos Reservation in eastern Arizona, where they again excavated an irrigation ditch—this time on the Gila River—and developed farms. The Yavapai were unhappy at San Carlos, and requested permission to leave. On receiving permission, they returned to their homeland on the Verde River, where they continued farming, making use of irrigation ditches dug by soldiers at Fort McDowell before it was abandoned by the U.S. Army. Since non-Indians had settled on the best agricultural lands, the Yavapai survived on the lands not used by non-Indians.

In 1903, the Yavapai petitioned President Theodore Roosevelt for a reservation at Fort McDowell. Their petition stated, in part:

> We are not in a starving condition but for three years we have been living in miserable brush tepees on the barren hills, obliged to shift for a poverty-stricken existence while white and Mexican trespassers upon reserved public lands have occupied and enjoyed all the harvests from the only fruitful lands on the reservation. We left our reservation on the Gila River [San Carlos] under passes from the Indian Agent because we had no water with which to irrigate the arid lands and we came to the Verde River, the home of our forefathers from which our people were forcibly removed many years ago, with the solemn promise from General Crook and other officers that if we served them as scouts and soldiers and were true to our trust we should sometime return and this land we love so well should be ours. How well we have kept our compact is well known and is a matter of record in the War Department. * * * In view of these facts we most earnestly urge that we no longer be left to eke out a miserable existence on the arid hills but that action be taken at once and the bill [to create a reservation] passed or defeated. We desire nothing more than that we may be enabled to become self-supporting, self-respecting and independent American citizens.

On September 15, 1903, President Roosevelt signed an Executive Order setting aside those lands at Fort McDowell that had not been legally settled. A year later Congress appropriated $50,000 for the purchase of non-Indian claims on the reservation. By 1905 all of the claims had been purchased and the entire reservation belonged to the Fort McDowell Indian Community. The reservation is located about 23 miles northeast of the City of Phoenix, upstream from the confluence of the Salt and Verde Rivers, and encompasses 24,680 acres of land extending two miles east and west of the Verde River for a distance of about ten miles.

## Federal Efforts to Relocate the Community

The Yavapai irrigated their farms at Fort McDowell with Verde River water diverted by temporary diversion dams and distributed via canals. The difficulties of maintaining the irrigation system

were exacerbated by a continual need to rebuild the brush and rock diversion dams. The Community made numerous requests to the Bureau of Indian Affairs for assistance in building a permanent diversion structure. Despite strong support from the Chairman of the House Committee on Indian Affairs, Rep. John H. Stephens of Texas, and others in Congress, the Bureau refused.

The Bureau's refusal was based primarily on its own determination that it would be better for the Fort McDowell Yavapai people to move from their 24,000 acre reservation to 1,400 acres on the Salt River Reservation, in part because it would cost less to provide an irrigation system for them at Salt River than at Fort McDowell. The Bureau persisted in attempting to relocate the Fort McDowell Indian Community to the Salt River Reservation, despite the Community's adamant objections to moving and the fact that the Yavapai at Fort McDowell did not get along with the Pima at Salt River. Finally, when the Bureau tried to force the move after 20 years of attempting persuasion, it discovered that the state court would not allow a transfer of the Fort McDowell Indian Community water rights to the Salt River Reservation.

Because of the Bureau's intention to relocate the Fort McDowell Indian Community, it provided very little assistance to the reservation. A 1933 Interior Department report indicates that during the preceding 30 years the Indian Irrigation Service spent only a little over $7,000 at Fort McDowell. A 1935 report found that of $20,000 earmarked for work at Fort McDowell, $15,000 was diverted and spent on behalf of the Indians of the Salt River Reservation. Consequently, the Community farmed under adverse conditions. Much of its water supply simply flowed down the river and was used by downstream farmers, and the United States used its plan to relocate the Community as a reason not to provide assistance in constructing a permanent and reliable water delivery system.

### Kent Decree—Tribal Water Rights

In 1903, landowners in the Salt River Valley organized the Salt River Water Users' Association to contract with the Federal Government for the building of Roosevelt Dam, one of the first project's approved under the Reclamation Act of 1902. In 1904, the Secretary and the Users Association entered into a contract for the repayment of costs associated with the project, now referred to as the Salt River Project (SRP). The contract provided that only members of the Users Association would receive water from the project.

In 1905, a lawsuit entitled Hurley V. Abbott, et al , was filed in the District Court of the Territory of Arizona to determine the priority and ownership of water rights in the Salt River Valley and to provide for their orderly administration. In 1907, the United States Attorney appeared before the Court to assert water rights on behalf of the Indians farming at the Fort McDowell and Salt River Reservations. At the trial the Government provided evidence regarding farming at Fort McDowell at that time, as well as information regarding its plans to relocate the Fort McDowell Yavapai people. As a result, Judge Edward Kent issued a decree awarding to the Fort McDowell Indians only that amount of water then

being used by them and only on a temporary basis. In the words of the Kent Decree:

> For many years last past a number of Indians living on land within the Camp McDowell Reservation, situated along the Verde River above its conflux with the Salt River, have cultivated such land by means of water diverted from the Verde River. The extent of such cultivation is approximately 1,300 acres. The maximum amount of water to which this land is entitled is 390 miners' inches [7,060 acre-feet] constant flow. As a matter of fact, for some years last past, because of the insufficient means of diversion of the water from the river, and for other causes, these Indians have not been able to divert from the river the amount of water necessary for the proper irrigation of the land. It is the express purpose and intention of the Government within the next year to remove these Indians from this reservation to the Salt River Reservation, and to have them settle upon land within the reservation to be irrigated by means of the proportionate share in the stored water in the Roosevelt reservoir, to which such lands, as land in Class B or Class C may acquire the right to share. In the expectation of this change of domicile and discontinuance of use of water as at present made from the Verde River by these Indians, and until the further order of the Court upon application with respect thereto in this suit, if hereafter necessary, the present diversion and use of water upon the said land in the Camp McDowell Reservation by these Indians may be maintained.

Two years before the Kent Decree was entered, the United States Supreme Court issued its decision in *Winters* v. *United States*, 207 U.S. 564 (1908). Representing the Indians of the Fort Belknap Reservation, the United States argued and the Supreme Court held in *Winters* that in setting aside the reservation the United States also reserved water sufficient to support a permanent homeland on the reservation. Despite the *Winters* decision, the U.S. Attorney representing the Fort McDowell Indians did not make a claim to Federally reserved water rights in Hurley or amend the territorial law claim he had made. In addition, although the award of 7,060 acre-feet was temporary, because the Court knew the Government intended to move the Fort McDowell Indians, the Government did not seek additional water for them when it became clear that the Community would not be relocated. As a result, the limited right under the Kent Decree is the Community's only clear entitlement to water.

## Verde River Storage

In 1935, the Secretary and SRP agreed to build Bartlett Dam on the Verde River upstream from Fort McDowell. In 1936, the Interior Department's Division of Investigations submitted a report to the Office of Indian Affairs alleging that SRP had failed to deliver water to Indian lands and had appropriated that water for its own use. The report recommended that the Government amend all ex-

isting agreements with SRP to set out clearly its obligations to Indians and to require SRP to compensate the Indians for losses. Attached to the report were tables from the Water Commissioner for Maricopa County for the years 1925 through 1934 showing that Fort McDowell either did not receive, or was unable to use, the 7,060 acre-feet awarded in the Kent Decree. Bartlett Dam and, later, Horseshoe Dam upstream from Bartlett, were constructed without any actions taken by the United States to carry out the report's recommendations. Although the 1935 Bartlett Agreement provided that twenty percent of the water storage at Bartlett Dam would be for the benefit of the Salt River Reservation, no provision was made either to develop new water supplies for the Fort McDowell Reservation or to store the Community's Kent Decree water.

### Plans to Inundate Fort McDowell

In 1901, the United States Geological Survey identified the confluence of the Salt and Verde Rivers, just downstream from the Fort McDowell Reservation, as a dam site. In 1956, the Director of the Geological Survey asked the Commissioner of Indian Affairs to comment on a proposal to build Maxwell Dam at the confluence. In response, the Commissioner wrote that the proposed reservoir "covers the entire area of farm land and approximately one-half of the grazing land of the Indians at Fort McDowell." This "would eliminate the use of this Indian reservation as a homesite" because the lands that would remain unflooded "are rocky hills without value for farming and incapable of supporting an economic number of cattle."

In 1968, Congress enacted a Colorado River Basin Project Act, which authorized construction of "Orme Dam or a suitable alternative" at the confluence of the Salt and Verde Rivers as a feature of the Central Arizona Project (CAP). Section 302 of the Act authorized the Secretary to condemn 15,900 acres of the 24,000-cre Fort McDowell Reservation for Orme Dam reservoir. Planning for Orme Dam construction continued until 1977, when President Carter recommended elimination of Orme Dam from the CAP, in large part because of the social, economic and environmental impacts of inundating the Fort McDowell Reservation. In 1987, Congress designated New Waddell Dam on the Agua Fria River, modifications to Roosevelt Dam, and up to 30,000 acre-feet of water purchased with non-Federal funds as the "suitable alternative" to Orme Dam.

The pendency of plans for a confluence structure effectively precluded any efforts by Federal agencies to assist the Community in developing any of the reservation area that might be within the conservation pool or within the area needed for flood control. This was particularly true from 1968 to 1977. As a consequence, the reservation development that has occurred since 1968 has been primarily the result of the Community's own efforts.

In fiscal year 1989, the Community's total revenues were just under $2.5 million, of which only one-third came from the BIA and other Federal agencies. The single largest source of income for the Community is its bingo operation, which contributes about forty percent of the Community's operating budget. Other tribal enter-

prises include a tribal farm, a gas station, a sand and gravel operation, and a plant nursery, all of which are operated by independent commissions or boards. Profits from tribal enterprises are dedicated to a range of community services, including an accredited pre-kindgergarten through second-grade school (more than 100 resident members of the 700-member tribe are under the age of five), a school food program, library, recreational facilities and programs for the elderly.

Since 1981 the Community has invested three-quarters of a million dollars of its own funds in the tribal farm, increasing from 30 to 730 the number of acres under production. In 1990, the farm is expected to be self-sustaining and in 1991 to show a profit. Most of the farm's acreage produces crops for sale locally; some land is used by members for grazing cattle. In addition, a community vegetable garden is planted each year, which is operated by community members for their own use.

The Community's efforts have reduced the unemployment rate from 50.4 percent in 1984 to 28 percent in 1988 (267 employees out of a civilian work force of 371). However, 40 percent of those employed earn less than $7,000 annually, and per capita income is much lower than in the surrounding communities. Due to lack of training and education, few tribal members are employed outside of the reservation.

All development on the reservation is done under a master land use plan adopted by the tribal council to promote development of a balanced, self-sustaining reservation economy. The plan envisions full development as including 4,100 acres in agricultural production; 419 acres for commercial development; 454 acres for industrial use (primarily light industry); 2,174 acres for residential use; 3,233 acres for recreational, resort and special use; and 14,684 acres for open space and wilderness.

Absent delivery of more water to the reservation, however, there will be no further development at the Fort McDowell Reservation; agricultural or otherwise. At present, the Community is using essentially all of its Kent Decree water. It follows that a settlement of the Community's water rights is the key to the future at Fort McDowell.

## Litigation/Negotiation/Agreement

In 1978, the State of Arizona initiated a general stream adjudication in the Arizona Superior Court to determine all rights to the Gila River and its tributaries, which include the Verde River. In 1985, the United States filed a claim in this adjudication for a Federally reserved water right on behalf of the Fort McDowell Indian Community for approximately 31,500 acre-feet per year for all purposes: irrigation, domestic, municipal, stock watering, industrial and mining. The Community filed its own claim for 48,000 acre-feet. Subsequently, the Community and Government experts have agreed that amended claims should be filed, in the event a settlement is not reached, for a claim to approximately 53,000 acre-feet per year on behalf of the Community. This amended claim would include water sufficient to irrigate about 7,500 acres of land deemed to be practicably irrigable.

About the same time as the state proceeding was initiated, the Community filed a suit in Federal court seeking quantification of its Federally reserved water right. After protracted litigation over the competing jurisdictions of the state and Federal courts, the United States Supreme Court ruled in *Arizona* v. *San Carlos Tribe*, 463 U.S. 545 (1983), that the Federal court should defer to the state court proceeding. Because the state court litigation is expected to take decades and be very costly, the Community and its neighboring parties in the litigation—the Salt River Project, Roosevelt Water Conservation District, local municipalities, and others—agreed to attempt to negotiate a settlement of the Community's Federally reserved water rights.

After more than five years of negotiations, the parties have produced an agreement that provides for the quantification of the Community's entitlement to water and settles all claims between the Community and neighboring non-Indian communities. For this agreement and the settlement it contemplates to become effective, Federal legislation is necessary. To this end, S. 2900 was introduced on July 25, 1990 by Senator McCain and was referred to the Select Committee on Indian Affairs. As introduced, S. 2900 was identical to H.R. 5063 which was introduced in the House of Representatives on June 14, 1990 by Mr. Udall and Mr. Rhodes. On July 17, 1990, the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs held a joint hearing on H.R. 5063. On August 3, 1990, the House Committee on Interior and Insular Affairs ordered H.R. 5063 to be favorably reported to the House with an amendment in the nature of a substitute. On September 25, 1990, the Select Committee on Indian Affairs adopted an amendment in the nature of a substitute to S. 2900 which was offered by Senator McCain.

## Committee Amendment

The Committee amendment to S. 2900 incorporates the provisions of S. 2900 and the provisions of H.R. 5063 as reported by the House Committee on Interior and Insular Affairs. In addition, the Committee amendment contains new language which was developed to resolve serious concerns which were raised by Interior Secretary Lujan.

The Committee amendment ratifies the Settlement Agreement and authorizes the Federal actions and appropriations necessary for its implementation.

The Agreement and the Committee amendment quantify the Community's total water rights, from all sources, at 36,350 acre-feet per year. The water is intended to be sufficient to irrigate 4,000 acres of agricultural land and to develop 18,350 acres for urban and other uses within the reservation. The Salt River Project will contribute 6,730 acre-feet of water and the Roosevelt Water Conservation District 3,200 acre-feet, and SRP will provide storage capacity behind the Bartlett and Horseshoe Dams on the Verde River to enable the Community to gain full use of its 7,060 acre-foot Kent Decree water rights.

The Committee amendment confirms existing agreements between the United States and the Salt River Project and among

SRP, Phelps Dodge Corporation and the Defense Plant Corporation regarding storage of water at Horseshoe and Bartlett Dams. It requires the Secretary to acquire 13,933 acre-feet of water either from sources in the Harquahala Valley west of Phoenix, from entities along the Verde River upstream from Fort McDowell or from any other sources available to the United States. The Committee amendment also provides the Secretary with the necessary authority to acquire and deliver such water to the Community via exchanges with SRP. In addition, it authorizes the Community to lease its allocation of 4,300 acre-feet of Central Arizona Project water to the City of Phoenix.

The Committee amendment provides for the creation of a Community Development Trust Fund, into which would be deposited the Community's water lease revenues, $2,000,000 to be contributed by the State of Arizona, and a Federal appropriation of $23,000,000. The Community would also receive a $13,000,000 loan for which it has applied under the Small Reclamation Projects Act in lieu of $7,000,000 which the United States is otherwise required to expend to constuct water delivery facilities on the Community's reservation as part of the Central Arizona Project.

The Committee amendment provides that the benefits to the Community's members from the settlement constitute full satisfaction of all of their claims for water rights under Federal and state laws, and authorizes the United States and the Community to waive and release the Community's past, present and future claims to water. Upon the waiver of those claims, the Secretary will have no further authority under the Colorado River Basin Project Act to withdraw any portion of the Community's reservation for purposes of a dam and reservoir at the confluence of the Salt and Verde Rivers.

Local contributions to the settlement include approximately 12,000 acre-feet of water annually (with an estimated value of $3,000 per acre-foot), lease revenues, and a state appropriation of $2,000,000. The local parties estimate their additional costs as a result of water quality deterioration and loss of exchange capacity and other indirect cash costs at $8,000,000, bringing the total local costs of the settlement to approximately $44,000,000. Federal costs would be at least $36,000,000 for the development fund appropriation and the loan (which is repayable at no interest. The total cost of the settlement to the Federal government will not be known until the Secretary determines from which source or sources he will obtain the 13,933 acre-feet of water needed to fulfill the Community's water entitlement pursuant to the Act and what share of the costs of obtaining that water will be attributable to the Community's settlement. The ratio of local to Federal costs is thus likely to be approximately 50-50.

The settlement will not become effective until the Secretary publishes findings that the major actions required by the Act and the Settlement Agreement have been accomplished, including the Secretary's signing of the final version of the Agreement.

Section 4(a) of the Committee amendment ratifies, confirms and declares valid a 1935 agreement between the United States and SRP, as amended, and a 1944 agreement among SRP, Phelps Dodge Corporation, and the Defense Plant Corporation, relating to the

Verde River Storage Works (Bartlett and Horseshoe Dams), and including the rights to Verde River storage by the United States and SRP, with the exception that nothing in the Act or the Agreement shall effect the validity or invalidity of any permit, right-of-way, license or grant held by Phelps Dodge Corporation for the use of land or water within the San Carlos Apache Reservation. Ratification and confirmation of these agreements expressly includes those provisions in the agreements by which SRP is required to save and hold harmless the United States. Ratification and confirmation of the agreements is not intended to have any effect on the authority or jurisdiction of the State of Arizona to determine, in a state proceeding pursuant to state law, the priority dates and quantification of any storage rights which may be found to exist.

At the hearing on July 17, 1990, SRP testified that it regards the confirmation of water storage rights as crucial to ensuring that SRP and the United States are able to meet their obligations, not only under the terms of the Fort McDowell settlement but also under the Salt River Pima-Maricopa Indian Community Water Settlement Act (102 Stat. 2549), by putting to rest any uncertainty as to the validity of Verde River storage rights. The Administration strongly objected to section 4(a), in particular to the language confirming water storage rights, on the grounds that confirming water storage rights may have the effect of taking property interests in water rights of persons and entities not party to the Agreement; that Federal policy is to allow state courts to adjudicate water rights held by the United States, and that it may impact the litigation position of other Indian tribes not involved in the settlement.

As reported by the Committee, the amended section 4(a) retains the language as negotiated and requested by the non-Federal parties, with the addition of language disclaiming any impacts of the Act or the Agreement on rights held by Phelps Dodge Corporation regarding the use of land or water within the San Carlos Apache Reservation. Language has also been added to section 13 to make it clear that nothing in the Committee amendment is to be construed in a way which will adversely affect any other Indian water right. To address Administration concerns regarding the possible taking of property interests in water rights, language has been added to expressly include reference to the save and hold harmless provisions of the two agreements which are confirmed and ratified in section 4(a). The 1935 agreement provides in pertinent part that:

> * * * [the SRP] shall save the United States, its officers, agents and employees harmless as to any and all injury and damage to persons and property which may arise out of the care, operation and maintenance thereof.

The 1944 agreement provides that:

> In consideration of the approval of this contract by the Secretary of the Interior [SRP] hereby agrees to and will save the United States harmless from and against any and all claims for damages by persons, firms or corporations having or claiming to have the right to the use of the waters of the Verde River and arising out of the construction, operation or maintenance of said dam.

The Committee amendment incorporates these provisions in order to make it clear that SRP bears the responsiblity to third parties for any adverse consequences arising out of these agreements. Finally, to ensure that confirmation and ratification of the 1935 and 1944 agreements does not affect state jurisdication to determine priority dates and quantification of such storage rights as may exist, the Committee amendment includes language which expressly defers to state law on these matters.

The Committee recognizes a Federal trust responsibility to ensure that the water that the Community is entitled to use under the terms of the settlement actually is made available to the Community. The United States has the same responsibility under the terms of the Salt River Pima-Maricopa Indian Community Water Settlement Act (102 Stat. 2549). Section 4(a) is necessary to the fulfillment of this Federal trust responsibility.

In this same regard, section 4(b) of the Committee amendment directs the Secretary to contract with SRP for the use of up to 3,200 acre-feet of the existing storage rights of the United States and SRP behind Bartlett and Horseshoe Dams for re-regulation of the Community's rights to water under the Kent Decree. This storage is for seasonal regulation only, with no annual carry-over past October 1 of any year. Provision of this storage space will enable the Community to exercise fully its rights to the normal flows of the Salt River under the Kent Decree. Currently, without such storage, approximately 2,070 acre-feet of the Community's 7,060 acre-foot Kent Decree entitlement goes downriver unused during periods of low demand, particularly in the winter months. Details of the terms and conditions for storage and delivery of this water are set forth in the Agreement.

Section 5(a) of the Committee amendment also ratifies, confirms and declares valid a contract between SRP and RWCD, dated October 24, 1924, together with all amendments thereto and any extensions entered into pursuant to the Agreement. Pursuant to this contract, which the Secretary approved on December 2, 1924, RWCD received rights to approximately 40,000 acre-feet of water per year from the Salt and Verde Rivers, exclusive of floodwater, saved as a result of RWCD's lining approximately 28 miles of SRP canals.

Under the terms of the Agreement, RWCD must make available to SRP for transfer to the Community up to 3,200 acre-feet of water it receives under the 1924 contract. Consequently, the parties to the Agreement view Federal confirmation of the 1924 contract as necessary to assure the Community it will receive the water which it is to receive from RWCD and its successors under the Agreement. Section 5(a) makes clear that the 1924 contract, as amended, and as extended by the Settlement Agreement violates neither the Warren Act of February 21, 1991 (43 U.S.C. 523), nor any other provision of Federal law. A similar provision is found in section 6(b) of the Salt River Pima-Maricopa Indian Community Water Settlement Act (102 Stat. 2549), pursuant to which RWCD contributed 8,000 acre-feet of water to which it is entitled under the 1924 contract.

Section 5(b) of the Committee amendment directs the Secretary to revise the RWCD's subcontract for CAP agricultural water serv-

ice to include an addendum substantially in the form of Exhibit "10.3.2" to the Agreement and to execute the subcontract as revised. The revisions are intended to ensure that the RWCD will be able to substitute its CAP water for the river water it will make available to SRP for transfer to the Community under 5(a). The Community will receive the river water free of cost. RWCD, as part of its contribution to the settlement, will be required to pay the difference between the higher cost CAP agricultural water and the contributed river water.

Section 5(c) provides that the lands within the RWCD and the lands within the SRP shall be free from the ownership limitations of Federal reclamation law and all full cost-pricing provisions of Federal law, as is presently the case.

Section 5(d) provides that neither SRP nor RWCD shall become subject to the provisions of the Reclamation Reform Act of 1982 (RRA), (43 U.S. 390aa et seq.) by virtue of their participation in the settlement or their execution and performance of the Agreement, including, but not limited to, any exchanges provided for in the Agreement.

Under the terms of the Settlement Agreement, SRP and the United States would be required to amend existing reclamation agreements to provide water storage space for the Community. Amending these agreements could subject SRP to the RRA and to full cost-pricing limitations on water delivered to SRP's landowners for irrigation of certain crops. The SRP, which is not currently subject to either the RRA or full cost-pricing, will not participate in the settlement if RRA and full cost-pricing could be applied to its landowners as a result. The Committee acknowledges SRP's basis for participating in the settlement and views SRP's contributing 6,730 acre-feet of water to the Community, providing storage for the Community's water, and effecting exchanges of Verde River water for CAP water assigned to the Community as actions essential to the settlement. Accordingly, the Committee deems it appropriate to preclude SRP's landowners from becoming subject to the RRA and full cost-pricing as a result of SRP's reclamation contracts being amended to effect the settlement.

Under the terms of the Settlement Agreement, RWCD and the United States would be required to amend RWCD's CAP water service contract. Amending this contract, which will not be effective unless the Salt River settlement is final before December 31, 1991, could subject RWCD to the RRA, full cost-pricing and other provisions of Federal law. RWCD's contribution of 8,000 acre-feet of water to the Salt River Pima-Maricopa Indian Community settlement and 3,200 acre-feet to the Fort McDowell Indian Community settlement is premised on its ability to substitute CAP agricultural water for the Salt and Verde River water provided to the Indian communities. Such substitution will increase RWCD landowners' operating costs because the contract cost of CAP water is roughly three times the cost of RWCD's river water. RWCD, which has never been a reclamation project or subject to reclamation law, will not participate in the settlements if it cannot obtain CAP agricultural water at its current contract rate; if its farmers would be required to designate and sell excess acres as a result of using CAP water as a substitute for water provided to the Indian communi-

ties; or if its farmers would be forced to change the methods and arrangements by which they have historically farmed and managed their land. The Committee acknowledges RWCD's basis for participation in the settlement and views RWCD's contributions of 11,200 acre-feet of water as essential to the Salt River Pima-Maricopa and Fort McDowell Indian Community settlements. Accordingly, the Committee deems it appropriate to preclude RWCD's landowners from becoming subject to the ownership provisions of reclamation law or the full cost-pricing provisions of Federal law as a result of amending its contract to participate in the settlement.

Section 6 of the Committee substitute authorizes the Secretary to consider three sources of water to provide the Community with 13,933 acre-feet of water: (1) CAP agricultural water permanently relinquished by the Harquahala Vally Irrigation District (HVID) (7.67 percent of the CAP annual agricultural water supply); (2) CAP municipal and industrial water and CAP Indian priority water permanently relinquished by the City of Prescott (7,127 acre-feet), the Yavapai-Prescott Tribe (500 acre-feet), the Yavapai-Apache Tribe of the Camp Verde Reservation (1,200 acre-feet), the Cottonwood Water Company (1,789 acre-feet) and the Camp Verde Water Company (1,443 acre-feet); or (3) from any other source of water at the disposal of the United States. Any such water would be acquired by contract with the consent of the contracting entity and, with respect to the sources in (2), assigned to the Community in partial satisfaction of the Secretary's obligation.

Section 6(b) authorizes the Secretary to contract with the HVID to acquire any portion of the HVID's rights to CAP agricultural water. The Committee acknowledges the concern, expressed in testimony by other CAP agricultural water contractors and municipal interests in Pinal County, Arizona, that a consequence of the Secretary's exercising his authority under section 6 to convert HVID agricultural priority water to Indian priority would be to reduce the pool of agricultural water that is the basis for existing contracts for CAP agricultural water and the reallocation of uncontracted CAP agricultural supplies. The Committee also recognizes the strong interest of the Gila River Indian Community in a proposal whereby the Secretary could contract to provide Gila River with the entire amount of acquired HVID water and such other associated assets as may be appropriate, provided such water retains its agricultural priority and, provided further, that Gila River contract to provide the Fort McDowell Indian Community with 13,933 acre-feet of Gila River's Indian priority water. Accordingly, if the Secretary decides to use the authority provided by this section to acquire HVID water and associated assets, the Committee strongly recommends that he seek to enter into an agreement acceptable to the Gila River Indian Community. Should the Secretary reach an agreement with the Gila River Indian Community, the Committee believes that a number of longstanding problems could be resolved. Of principal concern to the Committee is the Secretary's ability to provide a cost effective and firm water supply to the Fort McDowell Indian Community to accomplish the purposes of this settlement. In addition, an agreement with the Gila River Indian Community would provide a portion of the water which the Committee believes is necessary to the ultimate settlement of the water

rights claims of the Gila River Indian Community. In the event an acceptable agreement cannot be achieved with Gila River, then the Committee recommends that the Secretary seek a similar arrangement with other willing Indian or municipal or industrial entities prior to any exercise of his conversion authority pursuant to section 6.

The Committee notes that the so-called "Ak-Chin surplus" water is not included in the Committee amendment as a potential source of water for the Fort McDowell settlement. This source was removed from S. 2900 in response to the testimony of numerous witnesses, including those from the Administration, Arizona's Department of Water Resources, the San Carlos Apache Tribe, the CAWCD, and municipal and agricultural entities in Maricopa and Pinal Counties, to the effect that Ak-Chin water would not be appropriate or acceptable for use in the Fort McDowell settlement.

Section 6 of the Committee amendment also authorizes the Secretary to acquire land and water rights from willing sellers in the Big Chino Valley of the Verde River watershed to replace a minimum of 7,000 acre-feet of CAP water made available by the entities listed in section 6(a)(2) for assignment to the Community. The Secretary cannot acquire any such land or water rights until he has first completed a study to determine what, if any, adverse effects the exercise of those rights would have on the flow or the biota of the Verde River, on the existence of Meda fulgida (spikedace) or any other threatened or endangered species.

The Secretary is authorized to acquire land and water rights, and to construct diversion, collection, and conveyance facilities sufficient to deliver the water to a delivery point at Sullivan Lake, but only if the study concludes that the exercise of those rights will not have an adverse effect on the flow or the biota of the Verde River and is not likely to jeopardize the continued existence of Meda fulgida (spikedace) or any other threatened or endangered species. The Secretary must make the completed study available for public inspection and comment. The Committee intends that the Secretary take no action based on the study until after having received and assessed public comment on its findings and conclusions.

If the Secretary acquires land and water rights under section 6(c), he is required to develop and implement a continuous monitoring program to ensure that groundwater pumping from the land acquired does not adversely affect the flow or the biota of the Verde River and to ensure that it will not jeopardize the spikedace or any other threatened or endangered species. The program shall be developed prior to and implemented concurrent with the construction of diversion, collection and conveyance facilities.

Subsection 6(c)(2) authorizes the Secretary to reimburse the City of Prescott for not more than $800,000 which the city may advance to the Secretary for the purposes of expediting completion of the study. The City of Prescott has expended more than $500,000 to study the hydrology of the Big Chino Basin to determine whether groundwater resources exist in the basin from which the city might be able to acquire and develop future supplies without adversely affecting the Verde River and its biota or other water right holders. The Secretary has a clear interest in obtaining the same information as a basis for deciding from which source or sources he may

best be able to secure water not only for the Fort McDowell settlement but also to meet his contractual obligations to deliver CAP water to the Yavapai-Prescott Tribe and Yavapai-Apache Indian Community of the Camp Verde Reservation.

The city is prepared to advance to the United States up to $800,000 to expedite the completion of the remaining studies to the mutual benefit of the city and the United States, provided the United States will reimburse the city for the funds so advanced. By its inclusion of subsection 6(c)(2), the Committee acknowledges the expenditures made to date by the City of Prescott, as well as the Federal interest in the information developed by the studies contemplated by this subsection. The Committee understands that information as to adverse impacts on the river or its biota or other water right holders developed during the early stages of these studies could preclude the need for their completion and thus the need to expend the entire amount of funds authorized. The Committee intends that the studies for which the city may advance its funds will be carried out by such agency and by such means as the Secretary deems appropriate.

Section 6(d) authorizes the Secretary to construct water conveyance facilities from Sullivan Lake to a point downstream on the Verde River if he acquires the CAP contract or subcontracts of the Yavapai-Apache Community of the Camp Verde Reservation, the Cottonwood Water Company or the Camp Verde Water Company. The Secretary is further authorized to replace the CAP water acquired by placing it in the Verde River at the point downstream.

The Secretary cannot construct any such conveyance facilities to replace water assigned pursuant to 6(a)(2) until he has completed a study to determine whether the flow of the Verde River may be augmented without jeopardizing the continued existence of the spikedace or any other threatened or endangered species, and if so, where on the Verde River such augmentation would be most appropriate. If the study determines that a threatened or endangered species would be jeopardized by augmentation, the Secretary shall be barred from constructing any conveyance facilities. If the study determines that threatened or endangered species would not be jeopardized, then the Secretary is required to develop and implement a monitoring program to ensure that the augmentation does not jeopardize the continued existence of any threatened or endangered species.

The requirements of section 6 of the Committee amendment for studies to determine the potential effects of groundwater pumping and augmentation of the Verde River, as well as the effects of potential construction of diversion, collection and conveyance facilities, are intended to address the widespread concern expressed by communities, individuals, environmental and other organizations regarding the maintenance of the Verde River's natural flows and the continued survival of the spikedace and other threatened or endangered species dependent on those flows.

In Arizona, 95 percent of the riparian habitat that existed at the turn of the century has been lost, and most of the remaining five percent of this valuable habitat is found along the Verde River. The Interior Department testified that in the upper reaches of the river, in particular, significant Endangered Species Act concerns

have not yet been assessed. In addition to the threatened spikedace and its proposed critical habitat, the Verde River and its riparian zone include the endangered bald eagle, the proposed endangered razorback sucker, the endangered Colorado squawfish, and the loach minnow. Nine other species in the river corridor are listed as threatened or endangered by the State of Arizona.

The Committee intends that determinations of adverse impacts on the flows or biota of the Verde River, made either through the studies or monitoring programs required by this section, and which cannot be mitigated within the clear meaning and intent of the National Environmental Policy Act or the Endangered Species Act, shall preclude the Secretary from exercising his authority to secure land or water rights in the Big Chino Valley to provide replacement water to entities who make their CAP allocations available for assignment to the Fort McDowell Indian Community.

If the studies determine that groundwater pumping and augmentation can occur without jeopardizing threatened or endangered species, the Secretary may, in his discretion, proceed to acquire water as contemplated by this section. If, however, the monitoring of groundwater pumping and augmentation as required by this section indicates that continuation of such activity will jeopardize the spikedace or any other threatened or endangered species, the Committee fully expects the Secretary to take such actions as may be required, including halting pumping or augmentation or both, in carrying out his responsibilities under the Endangered Species Act, the National Environmental Policy Act, this Act and any other applicable environmental law.

Section 6(e)(1) of the Committee amendment directs the Secretary, acting on behalf of the Yavapai-Prescott Tribe, to enter into agreements with the City of Prescott and such other parties as may be necessary to ensure that the Yavapai-Prescott Tribe will receive its share of the water to be developed pursuant to this section. Under existing arrangements, the Tribe receives its water supply from the city. By this provision, the Committee intends the Secretary to be actively involved in ensuring that the Tribe receives its entitlement to water under this section under reasonable terms and at reasonable costs.

Section 6(e)(2) requires the Secretary, at the request of the Yavapai-Prescott Tribe, to secure long-term grazing privileges for the Tribe on the land the Secretary may acquire in the Big Chino Valley. This provision recognizes that the Tribe's existing land base and economy is limited and that permitting the Tribe to graze animals on the acquired lands, provided that such grazing does not interfere unreasonably with the exercise of water rights, could provide much needed economic benefits to the Tribe.

Section 6(g) of the Committee amendment provides that the entities which relinquish CAP water shall not be required to pay either the cost of acquiring land and water rights in Big Chino Valley or the cost of constructing the conveyance facilities from such lands to Sullivan Lake. If they relinquish their CAP allocations, the Cottonwood Water Company and the Camp Verde Water Company would be required to negotiate cost sharing agreements with the Secretary for construction of conveyance facilities from Sullivan Lake to a point downstream on the Verde River. The costs of such facilities

attributable to the Yavapai-Apache Indian Community of the Camp Verde Reservation would be borne by the United States.

Section 6(h) requires the Secretary to conduct parallel one-year studies, initiated within six months of enactment of this Act, of sources of water, other than those identified in section 6(a)(2), which could be used to satisfy the water rights of the Yavapai-Prescott Tribe and the Yavapai-Apache Indian Community of the Camp Verde Reservation. The Committee intends and expects the Secretary to involve and consult with the Yavapai-Prescott Tribe and the Yavapai-Apache Indian Community in the development of these studies. The purpose of these studies is to ensure that the Secretary will have reliable information available to him regarding what, if any, alternative water sources may exist from which to choose the most appropriate sources to meet his obligations to provide water to the Indians of the Yavapai-Prescott and Camp Verde Reservations pursuant to their CAP contracts and to meet his obligations to the Community under this section.

Section 6(i) of the Committee amendment requires the Secretary, if he acquires the CAP municipal and industrial water allocations of the City of Prescott, Cottonwood Water Company and/or Camp Verde Water Company for assignment to the Community in satisfaction of his obligations under this section, to exclude the costs associated with such water from the repayment obligation of the CAWCD.

Under its master repayment contract with the United States, the CAWCD is obligated to repay over $2,000,000 in Central Arizona Project costs attributable to municipal, industrial, and non-Indian agricultural purposes. CAP costs attributable to providing CAP water to Indian tribes are borne by the United States. This subsection provides for an adjustment in CAWCD's repayment costs to reflect the anticipated reduction in the amount of municipal and industrial water and a corresponding increase in the amount of Indian water.

Section 7 of the Committee amendment authorizes the Secretary to amend the Community's CAP water delivery contract to permit the Community to lease its four thousand three hundred acre-foot annual allocation of CAP water to the City of Phoenix for 99 years, commencing January 2, 2001 and ending December 31, 2099, and to allow for subsequent renewals. The city is required to pay the Community consideration as set forth in the lease and all operation, maintenance and replacement cost of the water to the United States or CAWCD. The city is not obligated to pay any water service capital charges or municipal and industrial subcontract charges other than the operation, maintenance and replacement costs and lease payments required by this section. The city has agreed to pay the Community $5,172,000 as consideration for the lease, with provisions for indexing, terms of payment, and other conditions set forth in the lease agreement.

Section 8 of the Committee amendment authorizes to be appropriated $23,000,000, together with interest accruing from one year after the date of enactment of this Act at a rate of interest determined by the Secretary of Treasury taking into account the average market yield on outstanding Federal obligations of comparable maturity, which the Secretary shall deposit into the Community

Development Trust Fund. The State of Arizona has agreed to appropriate $2,000,000 for this fund. The Community is to use the funds in the design and construction of facilities to put to beneficial use the Community's water entitlement or other economic and community development on the Community's reservation. The Secretary is also authorized to provide a $13,000,000 loan to the Community pursuant to the Small Reclamation Projects Act, to be repaid over fifty years without interest, for purposes of constructing facilities for the conveyance and delivery of water on the Community's reservation.

The Committee understands that the Small Reclamation Projects loan authorized by this section includes an amount, estimated at more than $7,000,000, which the United States would otherwise be required to expend for the design and construction of Central Arizona Project water delivery facilities on the Community's reservation. Given that the Community would not be obligated to repay such amount if it were expended by the Secretary pursuant to the authority provided under the Colorado River Basin Project Act, the Committee finds the terms of the loan to be appropriate.

Section 9 of the Committee amendment authorizes the Community and the Secretary, on behalf of the United States, as part of their performance of the Agreement, to execute a waiver and release of all past, present and future claims of water rights or injuries to water rights the Community and its members may have against the United States, the State of Arizona or anyone else under state and Federal law. In the event the authorization for the waiver of the Community's claims in this section does not become effective pursuant to section 12(a), the Community shall retain the right to assert past and future water rights claims as to all reservation lands.

Section 10 of the Committee amendment provides that execution of the Agreement by the Secretary as provided in section 11(d) shall not constitute major Federal action under the National Environmental Policy Act (NEPA). The Secretary shall comply with all aspects of NEPA and the Endangered Species Act and all other applicable environmental laws and regulations in proceeding through the implementation of this settlement, except that with respect to NEPA compliance, the Secretary is precluded from studying alternatives to the Community's on-reservation agricultural development plans which will be facilitated by the settlement or performed under the Community's Small Reclamation Projects loan.

This provision of the Committee amendment provides a narrow exception to the NEPA alternatives study process and is intended to respect the Community's master plan for the balanced development of its reservation. This plan, described in the background section of this report, is the product of years of study and discussion by the Community's membership of various alternatives for the development of their reservation. Provisions of the settlement agreement regarding the allocation and use of water—arrived at after extensive negotiations with SRP and other parties—are directly related to its provisions. Accordingly, the Committee sees no purpose or justification for requiring the Secretary and the Community to engage in further costly, time-consuming and, in all likelihood, redundant studies of reservation development alternatives.

Section 11 of the Committee amendment authorizes the joinder of the United States and/or the Community in any litigation filed in Federal district court by any party to the Agreement relating only and directly to the interpretation and enforcement of the Agreement and waives any claim by the United States and the Community to sovereign immunity from such suit. The Committee does not intend this provision to constitute a waiver of the sovereign immunity of either the United States or the Community in actions involving monetary damages.

Section 11 also approves, ratifies, and confirms the Agreement to the extent it does not conflict with the provisions of this Act, and directs the Secretary to execute and perform the Agreement and to execute any amendments to it which may be mutually agreed to by the parties. This provision, in conjunction with section 12(a)(8), is intended to ensure that the provisions of the final settlement agreement are consistent with the provisions of the Act and that the Secretary can prevent the Agreement and the settlement from becoming effective until and unless the Agreement and the Act are consistent.

Section 11 authorizes an easement in perpetuity on U.S. Forest Service lands to provide the Community with access to the area immediately adjacent to the northern boundary of the reservation for maintenance of its Verde River diversion works. As noted in the background portion of this report, the Community has for decades sought construction of a permanent structure immediately upstream from its reservation with which to divert Verde River waters into the Community's irrigation system. In settlement negotiations the Community abandoned its proposal for such a structure due to its high cost in favor of support by Federal negotiators and the other parties for a guarantee of perpetual access to its existing diversion works, consisting primarily of earthen dikes, to allow for maintenance and repairs. In view of the Community's long-established pattern of use, the clear need for access for maintenance of the works, and the lack of any competing uses for the lands in question, the Committee views the grant of a perpetual easement as reasonable and appropriate.

As introduced in both the House and Senate, H.R. 5063 and S. 2900 contained provisions repealing Section 304(c)(3) of the Colorado River Basin Project Act of 1968. Section 304(c)(3) requires the Secretary and any CAP contractor to agree that a surplus of groundwater exists and that drainage is or was required as a precondition to pumping groundwater from within the service area of one CAP contractor for use outside that contractor's service area. This provision, enacted twelve years before Arizona enacted its own comprehensive groundwater management law, was consistent with the purpose of the CAP to provide surface water from the Colorado River to central Arizona as a replacement source for pumped groundwater, with the long term objective of bringing the state's increasing groundwater overdraft into a "safe yield" or balanced condition.

At the July 17, 1990 hearing on H.R. 5063, there was sharp disagreement among the witnesses regarding the proposal to repeal section 304(c)(3). As reported by the House Committee on Interior and Insular Affairs, H.R. 5063 was amended to remove the repeal

language and to substitute language to the effect that section 304(c)(3) did not pre-empt state law. The Committee amendment to S. 2900 has deleted any reference to section 304(c)(3). The Committee found, after careful analysis, that no reference was necessary in order to accomplish the purpose of this settlement. The Committee urges the Arizona State legislature to act promptly to address the issue of groundwater transfers so that the Congress will not be called upon to do so in a future Indian water settlement. All of the witnesses who testified regarding section 304(c)(3) indicated that the state legislature has devoted considerable attention to the subject of groundwater transfers in recent years. Most of the witnesses expressed optimism regarding the prospects for definitive action by the legislature in the immediate future. The Committee believes that questions involving the use and allocation of water should, wherever possible, be resolved in local forums. In the absence of state law, the Committee believes that section 304(c)(3) continues to be important to fulfillment of the purposes of CAP.

## Legislative History

S. 2900 was introduced on July 25, 1990 by Senator McCain and was referred to the Select Committee on Indian Affairs. The Committee held a joint hearing with the House Committee on Interior and Insular Affairs on July 17, 1990 on an indentical House bill, H.R. 5063.

## Committee Recommendations and Tabulation of Vote

In an open business session on September 25, 1990, the Select Committee on Indian Affairs, by a unaminous vote of a quorum present, ordered the bill, with an amendment in the nature of a substitute reported with the recommendation that the Senate pass the bill as reported.

## Section-by-Section Analysis of the Substitute Amendment to S. 2900

*Section 1* provides that the Act may be cited as the "Fort McDowell Indian Community Water Rights Settlement Act of 1990."

*Section 2* lists the findings of the Congress with respect to the settlement and declares the purposes of the Congress in enacting this legislation.

*Section 3* defines the terms "Agreement"; "Central Arizona Project" (CAP); "Central Arizona Water Conservation District" (CAWCD); "Fort McDowell Indian Community" (Community); "Harquahala Valley Irrigation District" (HVID); "Kent Decreee"; "Roosevelt Water Conservation District" (RWCD); "Secretary"; and, "Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association" (SRP).

*Section 4* ratifies, confirms and declares valid a 1935 agreement between the United States and SRP, as amended, and a 1944 agreement among the SRP, Phelps Dodge Corporation, and the Defense Plant Corporation, relating to the Verde River Storage Works (Bartlett and Horseshoe Dams) and including the rights to Verde

River storage by the United States and SRP, with the exception that nothing in the Act or the Agreement shall affect the validity or invalidity of any permit, right-of-way, license or grant held by Phelps Dodge Corporation for the use of land or water within the San Carlos Apache Reservation. Ratification and confirmation of the agreements include provisions in the agreements whereby SRP is required to save and hold harmless the United States. The establishment of priority dates and the quantification of all storage rights is to be determined pursuant to state law in state proceedings.

*Section 4(b)* directs the Secretary to contract with SRP for the use of up to 3,200 acre-feet of the existing storage rights for the United States and SRP behind Bartlett and Horseshoe Dams for re-regulation of the Community's rights to water under the Kent Decree. This storage is for seasonal regulation only, with no annual carry-over past October 1 of any year.

*Section 5(a)* ratifies, confirms and declares valid a contract between SRP and the RWCD, dated October 24, 1924, together with all amendments thereto and any extensions entered into pursuant to the Agreement. Pursuant to this contract, which the Secretary approved on December 2, 1924, RWCD received rights to approximately 40,000 acre-feet of water per year from the Salt and Verde Rivers, exclusive of floodwater, saved as a result of RWCD's lining approximately 28 miles of SRP canals.

*Section 5(b)* directs the Secretary to revise the RWCD's subcontract for CAP agricultural water service to include an addendum substantially in the form of Exhibit "10.3.2" to the Agreement and to execute the subcontract as revised. The revisions are intended to ensure that the RWCD will be able to substitute its CAP water for the river water it will make available to SRP for transfer to the Community under section 5(a). The Community will receive the river water free of cost. RWCD, as part of its contribution to the settlement, will be required to pay the difference between the higher cost CAP agricultural water and the contributed river water.

*Section 5(c)* provides that the lands within the RWCD and the lands within the SRP shall be free from the ownership limitations of Federal reclamation law and all full cost pricing provisions of Federal law.

*Section 5(d)* provides that neither SRP nor RWCD shall become subject to the provisions of the Reclamation Reform Act of 1982 (RRA) (43 U.S.C. 390aa et seq.) by virtue of either its participation in the settlement or its execution and performance of the Agreement, including, but not limited to, any exchange provided for in the Agreement.

*Section 6(a)* directs the Secretary to acquire for the Community 13,933 acre-feet of water from one or a combination of: (1) CAP agricultural water permanently relinquished by HVID (7.67 percent of the CAP annual agricultural water supply); (2) CAP municipal and industrial water and CAP Indian priority water permanently relinquished by the City of Prescott (7,127 acre-feet), the Yavapai-Prescott Tribe (500 acre-feet), the Yavapai-Apache Tribe of the Camp Verde Reservation (1,200 acre-feet), the Cottonwood Water Company (1,789 acre-feet) and the Camp Verde Water Company

(1,443 acre-feet); or (3) any other water resources at the disposal of the United States. Any such water would be acquired by contract with the consent of the contracting entity and, with respect to the sources in (2), assigned to the Community in partial satisfaction of the Secretary's obligation.

*Section 6(b)* authorizes the Secretary to contract with HVID to acquire any portion of HVID's rights to CAP agricultural water.

*Section 6(b)(1)* authorizes the Secretary to use such water with its original CAP agricultural priority or to convert it, at the rate of one acre-foot per acre of HVID land eligible to receive CAP water, to a maximum of 33,263 acre-feet of Indian priority water.

*Section 6(b)(2)* authorizes the Secretary, as consideration for the fair value of water made available under 6(a)(1):

(i) to credit the HVID with an appropriate share of its outstanding CAP distribution system debt to the United States, with such share reflecting the relationship between the amount of the HVID's CAP water rights acquired by the Secretary and the HVID's total CAP allocation; and

(ii) to offset the CAWCD's annual CAP construction cost repayment requirements under its contract with the Secretary in amounts which total the balance of the fair value of the water required and not accounted for under section 6(b)(2)(i) until such value is exhausted.

*Section 6(b)(3)* authorizes the Secretary to transfer CAP facilities and water entitlements to CAWCD or to other non-federal entities. Upon such a transfer, the CAP water entitlement will cease to exist and the lands involved will be excluded from HVID. After transfer of HVID's CAP water rights to the Secretary, all lands remaining in HVID continue to be subject to the ownership limitation of Federal reclamation law and all full cost pricing provisions of Federal law until HVID's repayment obligation for the CAP distribution system has been satisfied.

*Section 6(b)(4)* requires the Secretary to deliver HVID water acquired for the Community under this section as provided for in the Agreement. It further requires the Secretary to use any remaining HVID water in the settlement of water rights claims of other Indian tribes having claims to the water in the Salt and Verde River System.

*Section (6)(c)* authorizes the Secretary to acquire land and water rights from willing sellers in the Big Chino Valley of the Verde River watershed to replace a minimum of 7,000 acre-feet of CAP water made available to the entities listed in section 6(a)(2) for assignment to the Community. The Secretary cannot acquire any such land or water rights until he has first completed a study to determine what, if any, adverse effects the exercise of those rights would have on the flow or the biota of the Verde River or on the existence of Meda fulgida (spikedace) or any other threatened or endangered species.

The Secretary is authorized to acquire land and water rights, and to construct diversion, collection, and conveyance facilities sufficient to deliver the water to a delivery point at Sullivan Lake, but only if the study concludes that the exercise of those rights will not have an adverse effect on the flow or the biota of the Verde River

and is not likely to jeopardize the continued existence of Meda fulgida or any other threatened or endangered species. The Secretary must make the completed study available for public inspection and comment.

If the Secretary acquires land and water rights under this subsection, he is required to develop and implement a continuous monitoring program to ensure that groundwater pumping from the land acquired does not adversely affect the flow or the biota of the Verde River and to ensure that it will not jeopardize the spikedace or any other threatened or endangered species. The program shall be developed prior to and implemented concurrent with the construction of diversion, collection and conveyance facilities.

The Secretary is authorized to reimburse the City of Prescott for not more than $800,000 which the city may advance to the Secretary for the purpose of expediting completion of the study.

*Section 6(d)* authorizes the Secretary to construct water conveyance facilities from Sullivan Lake to a point downstream on the Verde River if the Secretary acquires the CAP water contract or subcontracts of the Yavapai-Apache Community of the Camp Verde Reservation, the Cottonwood Water Company or the Camp Verde Water Company. The Secretary is further authorized to replace the CAP water acquired by placing it in the Verde River at the point downstream.

The Secretary cannot construct any such convevance facilities to replace water assigned pursuant to section 6(a)(2) until he has completed a study to determine whether the flow of the Verde River may be augmented without jeopardizing the continued existence of the spikedace or any other threatened or endangered species and, if so, where on the Verde River such augmentation would be most appropriate. If the study determines that a threatened or endangered species would be jeopardized by augmentation, the Secretary shall be barred from constructing any conveyance facilities. If the study determines that threatened or endangered species would not be jeopardized, then he is required to develop and implement a monitoring program to ensure that the augmentation does not jeopardize the continued existence of any threatened or endangered species.

*Section 6(e)* authorizes the Secretary to construct water conveyance facilities from Sullivan Lake to the City of Prescott's existing pumping facilities in the Little Chino Valley, Yavapai County, if he acquires the CAP water contract or subcontract of the Yavapai-Prescott Tribe or the City of Prescott. The city shall repay the Secretary for the costs of constructing such facilities, which would be used to convey water sufficient to replace the CAP water acquired from the city and/or the Tribe. The city would not be precluded from constructing these conveyance facilities itself.

The Secretary, acting on behalf of the Yavapai-Prescott Tribe, is authorized to enter into agreements with the City of Prescott and such other parties as may be necessary to ensure that the Yavapai-Prescott Tribe will receive its share of the water to be developed pursuant to this section.

The Secretary, at the request of the Tribe, is authorized to secure long-term grazing privileges for the Tribe on the land the Secretary

may acquire in the Big Chino Valley; provided, that such grazing does not interfere unreasonably with the exercise of water rights.

*Section 6(f)* authorizes the Secretary to contract to deliver replacement water to the entities which relinquish CAP water to the Secretary for the benefit of the Community; requires such water to be delivered to the Sullivan Lake delivery point; limits deliveries only to those entities identified in section 6(a)(2) and limits use of the water to within Yavapai County.

*Section 6(g)* provides that the entities which relinquish CAP water shall not be required to pay either the cost of acquiring land and water rights in the Big Chino Valley or the cost of constructing the conveyance facilities from such lands to Sullivan Lake. If they relinquish their CAP allocations, the Cottonwood Water Company and the Camp Verde Water Company would be required to negotiate cost-sharing agreements with the Secretary for construction of conveyance facilities from Sullivan Lake to a point downstream on the Verde River. The costs of such facilities attributable to the Yavapai-Apache Indian Community of the Camp Verde Reservation would be borne by the United States.

*Section 6(h)* requires the Secretary to conduct paralled one-year studies, initiated within six months of enactment of this Act, of sources of water, other than those identified in section 6(a)(2), which could be used to satisfy the water rights of the Yavapai-Prescott Tribe and the Yavapai-Apache Community of the Camp Verde Reservation.

*Section 6(i)* requires the Secretary, if he acquires the CAP municipal and industrial water allocations of the City of Prescott, Cottonwood Water Company and/or Camp Verde Water Company for assignment to the Community in satisfaction of his obligations under this section, to exclude the costs associated with such water from the repayment obligation of the CAWCD.

*Section 6(j)* requires the Secretary to comply with all applicable environmental law in the exercise of the authorities provided in this section.

*Section 6(k)* provides that, contingent upon the Secretary's first acquiring at least seven thousand acre-feet of CAP water from the entities identified in section 6(a)(2), there is authorized to be appropriated not to exceed $30,000,000 for the acquisition of land and water rights and for construction of diversion, collection and conveyance facilities to deliver replacement water to Sullivan Lake.

*Section 6(l)* authorizes such sums as may be necessary to provide for the studies required in subsections (c)(1), (d)(1) and (h) and for the monitoring programs described in subsections (c)(4) and (d)(2) of this section.

*Section 7(a)* authorizes the Secretary to amend the Community's CAP water delivery contract to permit the Community to lease its four thousand three hundred acre-feet annual allocation of CAP water to the City of Phoenix for 99 years, commencing January 1, 2001 and ending December 31, 2099, and to allow for subsequent renewals.

*Section 7(b)* authorizes, approves and confirms the amendments to the Community's CAP contract to provide for leasing.

*Section 7(c)* bars the United States from imposing on the Community the operation, maintenance and repair charges associated with the delivery of the water leased to the City of Phoenix.

*Section 7(d)* requires the City of Phoenix to pay the Community consideration as set forth in the lease and all operation, maintenance and replacement costs of the water to the United States or the CAWCD. The city is not obligated to pay any water service capital charges or municipal or industrial subcontract charges other than the operation, maintenance and replacement costs and lease payments required by this subsection.

*Section 7(e)* provides that the costs associated with the delivery of the Community's CAP water leased to the City of Phoenix shall be excluded from CAWCD's replacement obligation.

*Section 7(f)* authorizes the Community, with the approval of the Secretary, to lease the water it receives under section 6 for its fair market value for terms of not more than 100 years, for use only within Pima, Pinal, or Maricopa Counties. If such water is CAP water, then the provisions of subsections (a), (b), (c), (d), and (e) of section 7 shall apply to such leases.

*Section 7(g)* provides that no water received by the Community or its members pursuant to the Agreement may be sold, leased, transferred or in any way used off of the Community's reservation except as authorized by this section.

*Section 7(h)* provides that no water which is acquired by the Secretary pursuant to section 6(a)(3) from the Salt and Verde watersheds may be used by the Community off of the Community's reservation.

*Section 8(a)* requires the Community to establish a Community Development Trust Fund into which shall be deposited: (1) by the Secretary, the funds appropriated pursuant to section 8(b); and, (2) by the State of Arizona, $2,000,000 as required by the Agreement.

*Section 8(b)* authorizes $23,000,000 to be appropriated together with interest accruing from one year after the date of enactment at a rate of interest determined by the Secretary of Treasury taking into account the average market yield on outstanding Federal obligations of comparable maturity, which the Secretary shall deposit into the Community Develpment Fund. The Community is to use the funds in the design and construction of facilities to put to beneficial use the Community's water entitlement and/or other economic and community development on the Community's reservation.

*Section 8(c)* authorizes the Community, in its discretion, to use the Development Fund, principal and income, as of the date the waivers of claims in section 9 become effective, provided that no amount of the Federal and State appropriations deposited into the Fund may be used to make per capita payments to Community members.

*Section 8(d)* provides that, as of the date the waivers of claims in section 9 become effective, the Secretary shall have no further duties or responsibilities with respect to the Fund, nor shall the United States be liable for any claim or cause of action arising from the Community's use and expenditures from the Fund.

*Section 8(e)* authorizes and directs the Secretary to provide a $13,000,000 loan to the Community pursuant to the Small Reclamation Projects Act, to be repaid over fifty years without interest, for

purposes of constructing facilities for the conveyance and delivery of water on the Community's reservation.

The Community is required to establish an account into which it shall deposit $1,000,000, the principal and all accrued income from which shall be retained until the Community's obligation to repay the loan is fulfilled. Once the obligation to repay the loan has been fulfilled, the Community may use the account for such purposes as it deems appropriate.

No appropriations for the construction of the CAP after the date of enactment of this Act shall be used to plan, design, construct, or operate any facilities on the Community's reservation.

*Section 9(a)* provides that the benefits to the Community's members from this settlement constitute full satisfaction of their claims for water rights or injuries to water rights under Federal and State laws, from the effective date of this Act and thereafter.

*Section 9(b)* authorizes the Community and the Secretary, on behalf of the United States, as part of their performance of the Agreement, to execute a waiver and release of all past, present and future claims of water rights or injuries to water rights the Community and its members may have against the United States, the State of Arizona, or anyone else under State and Federal law.

*Section 9(c)* provides that, except for claims for enforcement of the Community's rights under the Agreement, the United States shall not assert, in its own right or on behalf of the Community, any claims against the State of Arizona or anyone else based upon water rights or injuries to water rights of the Community and its members.

*Section 9(d)* provides that in the event the authorization for the waiver of the Community's claims in this section does not become effective pursuant to section 12(a), the Community's shall retain the right to assert past and future water rights claims as to all reservation lands.

*Section 10(a)* provides that execution of the Agreement by the Secretary as provided in section 11(d) shall not constitute major federal action under the National Environmental Policy Act (NEPA). The Secretary is directed to carry out all necessary environmental compliance, except as directed in this section, during the implementation of the settlement.

*Section 10(b)* authorizes appropriations of such sums as may be necessary to carry out all necessary environmental compliance associated with the settlement, including mitigation measures adopted by the Secretary.

*Section 10(c)* designates the Bureau of Reclamation as the lead agency in regard to environmental compliance, and requires the Bureau to coordinate and cooperate with other affected federal agencies as required under applicable environmental laws.

*Section 10(d)* requires the Secretary to comply with all aspects of NEPA and the Endangered Species Act and all other applicable environmental laws and regulations in proceeding through the implementation of this settlement, except that with respect to NEPA compliance, the Secretary is precluded from studying alternatives as to the Community's on-reservation agricultural development plans which will be facilitated by the settlement or performed under the Community's Small Reclamation Projects loan.

*Section 11(a)* authorizes the joinder of the United States and/or the Community in litigation filed in Federal District Court by any party to the Agreement relating only and directly to the interpretation and enforcement of the Agreement and waives any claim by the United States and the Community to sovereign immunity from such suit.

*Section 11(b)* bars the United States from claiming any reimbursement or making any assessment of costs arising out of the implementation of this Act or the Agreement against any lands within the Community's reservation.

*Section 11(c)* exempts water received by entities other than the Community pursuant to the Agreement from having any effect on any future allocation or reallocation of the CAP supply.

*Section 11(d)* approves, ratifies and confirms the Agreement to the extent it does not conflict with the provisions of this Act; directs the Secretary to execute and perform the Agreement and to execute any amendments to it which may be mutually agreed to by the parties.

*Section 11(e)* deems section 302(a) of the Colorado River Basin Project Act, which provides for withdrawal of Community lands for Orme Dam and reservoir, no longer applicable to the Community as of the effective date of the Community's waiver of claims under section 9.

*Section 11(f)* authorizes an easement in perpetuity on U.S. Forest Service lands to provide the Community with access to the area immediately adjacent to the northern boundary of the reservation for maintenance of its Verde River diversion works.

*Section 11(g)* provides that upon the effective dates of the waivers of all of the Community's claims, along with those of the Salt River Pima-Maricopa Indian Community, the provisions of section 4(a) of this Act shall become effective.

*Section 11(h)* amends the Salt River Pima-Maricopa Indian Community Water Rights Act to conform the date contained in section 7(a) of that Act to the date otherwise used throughout that Act.

*Section 12(a)* lists actions which must be taken by the parties of the Agreement, by the Secretary and by the Congress before the Community's waiver of claims under section 9 becomes effective.

*Section 12(b)* provides that if the actions specified in section 12(a) are not completed by December 21, 1993, the Act shall not become effective.

*Section 13* provides that nothing in the Agreement or the Act shall be construed in any way to quantify or otherwise adversely affect the land and water rights, claims or entitlements to water of any Arizona Indian tribe, band or community, other than the Fort McDowell Indian Community.

## COST AND BUDGETARY CONSIDERATION

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, September 27, 1990.*

Hon. DANIEL K. INOUYE,
*Chairman, Select Committee on Indian Affairs,*
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 2900, the Fort McDowell Indian Community Water Rights Settlement Act of 1990.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER,
*Director.*

### CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 2900.

2. Bill title: The Fort McDowell Indian Community Water Rights Settlement Act of 1990.

3. Bill status: As ordered reported by the Senate Select Committee on Indian Affairs on September 25, 1990.

4. Bill purpose: S. 2900 would ratify an agreement between the Fort McDowell Indian Community (FMIC) and a number of local entities in Arizona to resolve FMIC's claim to water. The bill also would confirm or modify certain water contracts between the federal government and local entities to facilitate the agreement.

Section 6 of the bill would direct the Department of the Interior (DOI) to acquire 13,933 acre-feet of water for FMIC from two sources. Contractual water entitlements from the Central Arizona Project (CAP), up to a specified amount, could be acquired from the Harquehala Valley Irrigation District (HVID) (a nonfederal water authority) in exchange for a credit against HVID's outstanding debt to the United States. Construction repayments owed to the federal government from the Central Arizona Water Conservation District (CAWCD)—another nonfederal entity—also would be reduced in exchange for this water.

DOI also would be authorized—under provisions known as the Prescott option—to acquire water from a specified group of local interests. If DOI acquires at least 7,000 acre-feet of water under the Prescott option, and pending the completion of certain studies, DOI would be authorized to purchase land and water rights for the local entities to replace the water they relinquish for FMIC. DOI also would be authorized to construct facilities to deliver the replacement water. This section would authorize the appropriation of $30 million to pay the federal share of the acquisition and construction costs, and such sums as may be necessary to complete the studies. Any water acquired and not used to settle FMIC's claim would be available to settle other Indian water claims in Arizona.

Section 8 would require FMIC to establish a Community Development Fund. Twenty-three million dollars, plus any interest accruing between enactment of this bill and appropriation of the funds,

would be authorized to be deposited into the fund. These amounts, along with contributions from the State of Arizona, would be available to FMIC as soon as certain conditions are met.

DOI also would be authorized to provide FMIC with a $13 million loan for the construction of a water conveyance and delivery system. The loan would be repaid in 50 years without interest.

Section 10 would authorize the appropriation of whatever sums are necessary to carry out certain environmental compliance activities associated with the settlement.

Other sections of the bill would give FMIC the authority to waive or release certain water rights claims and to lease water to certain local entities.

5. Estimated cost to the Federal Government: The costs of S. 2900, assuming appropriation of the necessary amounts, are shown in the following table.

[By fiscal year, in millions of dollars]

| | 1991 | 1992 | 1993 | 1994 | 1995 |
|---|---|---|---|---|---|
| Direct Spending: | | | | | |
| Estimated Budget Authority | (1) | (1) | (1) | (1) | (1) |
| Estimated Outlays | (1) | (1) | (1) | (1) | (1) |
| Authorizations: | | | | | |
| Estimated Authorization Level | 41.0 | 6.0 | 2.0 | 3.4 | 2.8 |
| Estimated Outlays | 33.5 | 10.6 | 4.3 | 3.0 | 3.0 |

[1] CBO estimates that enactment of provisions in Section 6 authorizing the Bureau of Reclamation (BOR) to acquire certain CAP water entitlements from HVID would result in a loss of receipts to the federal government over the 1991–1995 period. These costs cannot be estimated, however, because the amount of water that will ultimately be acquired, and its value, are still the subject of negotiations. Based on current information from BOR and the Bureau of Indian Affairs, we estimate that the enactment of these provisions would result in a loss of receipts to the federal government of up to $26 million over the next five years, mostly in 1993 and 1994. Additional receipts would be forgone in subsequent years.

In addition, outlays totaling about $17.2 million from 1996 through the year 2000 would be necessary to complete water acquisition and construction activities under the Prescott option in Section 6.

The costs of this bill would be in budget functions 300 and 450.

Basis of estimate: For the purposes of preparing this estimate, CBO assumes that the bill will be enacted early in fiscal year 1991, and that the full amounts authorized will be appropriated by the middle of that year. Outlays were estimated based on information provided by BOR and local interests.

*Acquisition of water under the Prescott option.*—We assume that the federal government will be successful in acquiring at least 7,000 acre-feet of water under the Prescott option and that the full $30 million authorized for acquisition of replacement water and construction of facilities will be appropriated. Outlays are estimated to begin in 1992 and to total $12.8 million through 1995. We estimate that the studies required to be completed under this option will cost about $5 million over a two-year period beginning in 1991.

*Acquisition of water entitlement from HVID.*—The amount of water that ultimately would be acquired from HVID, and its value, would be determined through negotiations with HVID and CAWCD. At this time, we have no basis for predicting the amount of water that would be acquired, or the cost of acquiring it from

HVID. Information from BOR indicates that the value of all CAP water rights that could be acquired under these provisions is approximately $30 million. If all of these rights were acquired, the federal government would lose receipts totaling about $26 million over the next five years—$500,000 from HVID and $25 million from CAWCD.

The HVID's repayment obligation to the federal government currently totals $26 million, due over a 38-year period. Enactment of these provisions would authorize DOI to acquire HVID's CAP water entitlement and to forgive all future repayment obligations. If all of HVID's water entitlement is acquired, the federal government would forgo future repayments totaling about $26 million—$500,000 in the next five years (as discussed above), and the remainder over the following 33 years. Discounted to current dollars, the value of this repayment obligation is about $5 million.

In addition, if all these water rights are acquired, CAWCD construction cost repayments would be reduced by a total of $25 million. The forgone repayments would be in 1993 and 1994.

*Other provisions.*—CBO assumes that $23 million for the Community Development Fund and $0.6 million to carry out specified environmental compliance activities, will be appropriated by the middle of 1991. Outlays for the loan to FMIC would total $13 million over the 1991–1993 period.

6. Estimated cost to State and local governments: Not yet completed.

7. Estimate comparison: None.

8. Previous CBO estimate: On September 11, 1990, CBO completed an estimate of H.R. 5063, the Fort McDowell Indian Community Water Rights Settlement Act of 1990, as ordered reported by the House Committee on Interior and Insular Affairs on August 3, 1990. The estimated cost shown for H.R. 5063 is the same as that of S. 2900.

On May 21, 1990, CBO completed an estimate of H.R. 4148, a bill to authorize the Secretary of the Interior to acquire certain water rights for the settlement of Indian water rights claims in the State of Arizona, as ordered reported by the House Committee on Interior and Insular Affairs on April 25, 1990. That estimate is the same as our estimate of the impact of provisions in Section 6 relating to the Harquehala Valley Irrigation District.

9. Estimate prepared by: Theresa Gullo.

10. Estimate approved by: C.G. Nuckols, for James L. Blum, Assistant Director for Budget Analysis.

## Regulatory Impact Statement

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The committee believes that S. 2900, as amended, will have minimal regulatory or paperwork impact.

## Executive Communications

The Department of the Interior testified at the July 17, 1990 hearing on H.R. 5063 and expressed its opposition to enactment

unless the bill was amended to address Administration concerns. On September 20, 1990, Interior Secretary Lujan sent a letter to Senator Inouye, Chairman of the Select Committee on Indian Affairs, stating specific objections to the enactment of S. 2900. Subsequent negotiations between the Administration and the parties of the settlement have resulted in new provisions being included in the Committee amendment to address the Administration's concerns. Secretary Lujan's letter follows:

THE SECRETARY OF THE INTERIOR,
*Washington, September 20, 1990.*

Hon. DANIEL K. INOUYE,
*Chairman, Select Committee on Indian Affairs,*
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: This letter provides you with the Administration's views on S. 2900, the Ft. McDowell Indian Water Rights Settlement."

Because of the serious objections this bill raises and the adverse precedent that would be established if enacted, if S. 2900 is presented to the President in its current form, I would recommend that he disapprove it.

Our strong objection to enactment of this bill is based on the following reasons:

1. Language in section 4(a) contradicts long-standing Federal policy on validation of water rights and could give rise to legal challenges that the provision is unconstitutional. It would also contradict the Department's policy that it must oppose any settlement that could adversely affect the water rights claims of other Indian communities not a party to this settlement.

2. The bill would require the United States to commit significant Federal resources to purchase water and provide other related benefits as part of the settlement. Estimates of the Federal contribution are as high as $70 million depending on the cost of water. This amount far exceeds the Federal Government's legal exposure and would require that Federal taxpayers bear a disproportionate share of the settlement costs.

3. The bill fails to achieve finality despite the Federal Government's financial contribution to the total settlement package. For example, section 9(b) would preserve the Fort McDowell claims against the United States.

There are several issues, in addition to those mentioned above, that need time to be resolved.

A similar bill (H.R. 5063) reported by the House Interior Committee contains the same objectionable provisions as mentioned above.

The following are additional concerns on specific provisions of S. 2900:

*Section 2(a)(8).*—Even though the legislation is written under the assumption that the parties have finalized the settlement agreement the legislation would confirm, ratify and direct the Secretary to sign, to date there has not been a final agreement signed by any of the parties who have been negotiating with the Fort McDowell Indian Community. We do not believe the language in sections 11(d) and 12(a) provides the Secretary the necessary flexibility to

withhold execution of a settlement agreement should it include provisions objectionable to the Executive Branch or Congress.

*Section 4(a).*—We are opposed to the provisions that would "ratify, confirm and declare to be valid" contracts between private parties and between private entities and the United States. Our concern here is that the act of determining the validity and enforceability of contractual relationships should remain within the purview of the judiciary. When Congress ratifies and confirms the validity of certain contracts, it adds confusion to the legal rights of the contracting parties for one reason or another.

Our more serious concern is with the language "including the rights to Verde River storage," which is apparently intended to obtain a Congressional adjudication and validation of certain water rights held by the Salt River Project (SRP) and the Phelps Dodge Corporation.[1] Since this issue has been the subject of correspondence between the negotiating parties, we will not go into a detailed analysis of our objections to this proposed Congressional action. Rather, we will summarize three points of opposition.

First, there could be legal challenges to this provision. To the extent the provision is read as merely confirming whatever rights currently exist under the contract and state law, no legal objection could be raised. The argument could be made, however, that the legislation constitutes a grant of a federal water right. If this argument were found to be valid, there may be taking implications if it can be shown that there are persons or entities who presently have a property interest in the storage water.[2]

Second, Congress has consistently asserted a Federal policy of deferring to the state courts in regard to the adjudication of water rights. The McCarren Amendment, 43 U.S.C. 666, waives the government's immunity from suit in state court, and the Supreme court has repeatedly recognized the Congressional intention to allow the state courts to adjudicate water rights, including rights held by the United States.

Third, we are concerned that this action may impact the litigation positions of other Indian tribes who are not involved in this settlement. As established in the 1988 Salt River settlement, the Department's policy is that it cannot take or support any action in a given settlement that would adversely affect the water rights position or claims of an Indian community which is not a party to the settlement (see Section 13 of the Salt River Settlement Act). That was one of the main reasons we opposed the water rights confirmation provision in the draft Salt River Settlement, and it is also one of the main reasons we oppose similar language here. In light of what is said in section 12 of this proposed legislation, the water rights confirmation language would create an internal conflict

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[1] Section 4(a) addresses two reservoirs on the Verde River in Arizona. In the downstream reservoir, the United States holds certain water rights on behalf of the Salt River Indian Community. Thus it is our position that the government too must obtain confirmation of its water entitlement from a court, as opposed to Congress.

[2] While the language of the specific provision being reviewed does not appear to withdraw a Tucker Act remedy, there could be a challenge to the provisions as facially unconstitutional if it could be shown that those deprived of their property interest were cut off from the benefits of Tucker Act litigation by some other provision of the proposed bill.

within the legislation which would almost certainly lead to further litigation in the future.

In summary, we believe the proposed language in section 4(a) would produce adverse consequences in a number of respects and would provide a dangerous and unnecessary precedent. It would seem unwise to allow this issue to be injected into the traditional Federal-State controversy in the Congress over Western states water rights. This is particularly true when we have an appropriate remedy which strikes a fair compromise for all the Parties involved.

*Section 5(a).*—For reasons similar to those outlined above, we object to the confirmation of contracts language concerning the Roosevelt Water Conservation District (RWCD). Congress need not, and should not, engage in the practice of confirming and validating contracts, which is a judicial function.

*Section 5(c) and 5(e).*— As presently written, these subsections can be read to give blanket exemptions to RWCD and SRP from ownership limitations and full cost pricing provisions of Federal Reclamation Law. The position of the Department, as set out in the March 12, 1990 Federal Register on Criteria and Procedures governing Indian water right negotiations, is that exemptions from the Reclamation Laws generally should not be part of Indian water rights settlements. We recognize, however, that parties to the agreement wish to avoid any implication that their participation in water exchanges that are part of the agreement would by itself bring them under the full price and acreage limitation provisions of Reclamation Law.

*Section 6.*—Initially, it is important to state that we would prefer not to have an undefined source for the shortfall water. By relying on different possible alternatives, none of which can be defined as certain, the settlement participants run the risk that none of the sources identified will turn out to be feasible, and thus the settlement could fail. We would prefer, as with all settlements, to have a fixed source for the shortfall so that the settlement rests on a firm foundation.

Equally important, the actual cost of each of the alternatives is unknown. As discussed in detail below, the cost to the United States of these sources must be known and acceptable to the United States before it can be committed to any alternative. Due to a variety of factors, we cannot be certain at this time as to the feasibility of the two sources listed.

As currently envisioned, the HVID alternative is a complex series of transactions in which the United States will participate in the "buy-out" of the HVID lands, including the retirement of HVID CAP debts, and receive in exchange the rights to the block of CAP non-Indian irrigation agricultural water for which HVID has currently contracted. Rights to the groundwater will go to CAWCD.

It is likely that most of the distribution system would no longer be used. We are concerned about the potential for liability risk for any abandoned works and for costs of keeping the abandoned works from being a safety hazard. Since any abandoned CAP distribution system works will no longer be needed for their original purpose, and portions of such works may be of benefit to CAWCD

or its subcontractors, it would be advantangeous to the United States if title to the abandoned CAP works could be transferred to CAWCD. The United States would retain title to any facilities required to deliver CAP agricultural water to the Harquahala lands that are not purchased by CAWCD. One of the conditions for Federal participation in the Harquahala buy-out is that CAWCD accept title to all of the abandoned facilities. If CAWCD is not willing to take title, the United States should require CAWCD to pay any costs associated with managing the abandoned system.

In regard to the entire Prescott alternative, we believe we are compelled to comment on the nature of this transaction and the precedent it may set within the context of CAP. While the assignment of CAP entitlements in this situation may not be the type of "exchange" we have contemplated under the CAP legislation, 43 U.S.C. 1524(d), we believe this transaction is within the authority of the Secretary to implement so the participating entities may ultimately benefit from their CAP allocations. However, because the entities named in section 6(a)(3) have not yet entered into contracts with the Secretary to receive the CAP water they have been allocated, there is an open question as to the extent, if any, of the legal right these entities have to the CAP water they would be "permanently" relinquishing. Thus, the validity and extent of the right must be balanced against the Federal cost of supplying replacement water to the entities as required by section 6(a)(3)(i). Finally, as stated above, we do not agree with the cost sharing proposal advanced by the city of Prescott as embodied in the proposed legislation. While additional investigating has indicated that the cost may be considerably less than the $5,000 quoted in our testimony, this matter needs to be addressed prior to implementation of the legislation.

*Section 8.*—We strongly oppose the Federal contribution required by S. 2900 because it far exceeds any risk of legal liability relative to the claims advanced by the Fort McDowell Indian Community and is unjustified given the contribution of the local participants. Estimates of the Federal contribution range as high as $70 million depending on the cost of procuring water. For reasons of fairness and prudence, Federal taxpayers should not bear a disproportionate share of the total settlement costs. We recommend that any Federal contribution should be determined based upon this Administration's policy for settling Indian water rights claims.

*Section 10.*—Experience has indicated that the water rights settlement process provides an unusual framework within which to apply the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). One initial problem is to determine when the "major federal action" is initiated. In this settlement, as with the Salt River settlement in Arizona, the Congress will approve the settlement and the Secretary will thereafter execute the agreement (as directed by the Congress) and proceed to implement the settlement provisions. Under these circumstances, we believe the ministerial act of signing the settlement agreement does not constitute a "major federal action." Rather, we believe the Federal action occurs during the implementation phase. An acknowledgment of this in this Act will avoid any confusion.

The unique nature of Indian water rights settlements requires a unique Congressional response in regard to environmental compliance. This response is designed to give respect to Indians' on-reservation development plans. To that end, H.R. 5063 includes a narrowly worded exception to the NEPA alternatives-study process which gives respect to the Community's future plans for development.

*Section 11(f).*—This section deals with a proposed amendment to section 304(c)(3) of the Colorado River Basin Project Act (43 U.S.C. 1524(c)(3), a part of the CAP act). Fundamentally, the Department does not oppose an amendment of this type to the CAP legislation. However, we understand that the nature and scope of this amendment is still being addressed by the state entities and the Congressional delegation, and therefore, we are unable to comment on the final proposal.

*Section 14.*—This legislation should operate to provide a permanent easement across adjacent Forest Service land for the Community's diversion works on the Verde River and the first reach of its conveyance system. As we understand it, the Community is preparing language which will provide for the easement.

Thank you for providing an opportunity to comment on this important legislation. We will be pleased to respond to any questions you may have concerning the matters addressed herein.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program and that enactment of S. 2900 would not be in accord with the program of the President.

Sincerely,

MANUEL LUJAN, Jr.

## CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that enactment of S. 2900 will result in the following amendment to P.L. 100-512 (102 Stat. 2549).

**SEC. 7. COLORADO RIVER WATER EXCHANGE**

(a) On or before December 31, [1990] *1991*, the Secretary shall acquire from willing irrigation districts and their landowners (hereinafter "sellers"), rights to twenty-two thousand acre-feet of annual consumptive use of water from the main stream of the Colorado River in the State of Arizona with a contractual priority predating September 30, 1968, and which was not included by the Secretary, the Arizona Water Commission, or the Arizona Department of Water Resources in the determination of the water supplies available to the CAP for the purpose of establishing the initial allocations to non-Indian entities. Nothing in this Act shall alter the responsibilities of the United States under Article V of the March 9, 1964, Decree of the United States Supreme Court in Arizona versus California, 376 U.S. 340.

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